

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

EXTENDICARE HOMES, INC. d/b/a
BON HARBOR NURSING AND
REHABILITATION CENTER

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

Cases 25-CA-28991
25-CA-29088
25-CA-29119

Michael T. Beck, Esq. and Fredric D. Roberson, Esq.
for the General Counsel.
Todd M. Nierman, Esq. and Dustin D. Stohler, Esq.
(*Baker & Daniels*), of Indianapolis, IN, for the
Respondent.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: Upon charges and an amended charge filed by United Steelworkers of America, AFL-CIO-CLC (Union) against Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center (Respondent or Bon Harbor), a consolidated complaint was issued on July 16, 2004¹ alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by (a) discharging seven named employees² on January 14 because they engaged in concerted activities with each other for the purposes of mutual aid and protection by gathering together at Respondent's facility during their break to protest staffing conditions and complain to the news media about their terms and conditions of employment, (b) since January 15 refusing to reinstate these seven employees unless they agree not to engage in the activity described in (a) above or other protected concerted activity, and (c) removing Union literature from a bulletin board at Respondent's facility on March 13 despite allowing employees to post other types of nonwork-related literature on the same bulletin board; and that Respondent violated Section 8(a)(1) and (3) of the Act by verbally warning its employee Paulin on March 13 because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. In its answer, Respondent claims that the named employees walked off the job on January 14, and it non-discriminatorily removed from its bulletin boards solicitations on behalf of outside organizations, including the Union. Respondent admits that on March 13 it verbally warned Paulin. Respondent denies violating the Act as alleged.

A hearing was held on September 14 in Owensboro, Kentucky. The record was not

¹ All dates are in 2004 unless otherwise indicated.

² Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton and Tammy Snyder.

closed at the time because an additional unfair labor practice charge had been filed by the Union against the Respondent. By motion filed January 4, 2005, Counsel for General Counsel indicated that the additional charges filed by the Union against the Respondent had been resolved. He requested that the record be closed and a brief date be set. Upon the entire record
 5 in this proceeding, including my observation of the demeanor of the witnesses and consideration of the briefs filed by General Counsel and the Respondent on February 7, 2005, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation with a place of business in Owensboro, has been engaged in the operation of a nursing home. The complaint alleges, the Respondent admits, and I find that
 15 at all material times herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Facts

When called by Counsel for General Counsel, Respondent's Director of Nursing at its Owensboro facility, Carolyn Ann Davis, testified that Bon Harbor provides skilled nursing care and therapy; that the facility has a total of 132 beds on four units [Skilled (44), North (30), West (28), and South (30)], a large therapy department, and a dining room; that it employs about 100 nurses plus employees in activities, therapy, dietary, housekeeping, maintenance, and laundry; that she is second in the chain of command at the facility, and when the administrator of the facility, then Jennifer Hurt, is not present at the facility, she is the top management official at the
 30 facility; that she directly oversees the Registered Nurse (RNs) supervisors, Unit managers, Licensed Practical Nurses (LPNs), certified nursing assistants (CNAs) and certified medication aides (CMAs); that in January 2004 there were 2 unit managers, 3 RNs, 1 weekend RN supervisor, about 32 CNAs, 4 CMAs, and about 20 LPNs; that in January 2004 the LPNs were responsible for overseeing the CNAs and the CMAs to make sure that they are doing their jobs, directing their nursing assistants, providing medications, treatment, assisting in meals, and
 35 setting up doctor's appointments; that all LPNs are charge nurses except one who works on skin related problems; that one LPN, Donna Renfro, is responsible for making out the schedule; that CMAs pass out medication and render treatment; that CNAs are involved in direct patient care like bathing, grooming, ambulating, feeding, turning and repositioning, and assisting with activities; that in January 2004 one RN, Kim Steward, oversaw two of the units (Skilled and West) and an LPN, Della Boehman, oversaw the other two units (North and South); that there were three shifts in January 2004, namely 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m.; and that in January 2004 two LPNs and between four and five CNAs were assigned to a shift in the Skilled unit, one LPN and two or three CNAs to the North unit, one LPN and two or
 45 three CNAs to the West unit, and one LPN and two or three CNAs to the South unit.

When called by Counsel for General Counsel Davis testified that she arrived at the facility at 8 a.m. on January 14. About 10 a.m. Renfro paged her while she was at the Skilled Unit nurses station speaking with Adkisson. Davis testified that Renfro told her that several staff
 50 members and the media were out in the Respondent's parking lot; that she went to the parking lot going out the lobby door and asked Lemon, Kjelsen, Kelley, Paulin, Hamilton, and Tammy Snyder to come back in the facility; that there were television cameras present; that the

employees proceeded to follow her back to the facility; that she held the door open as the employees came into the facility and Lemon asked “You’re saying we’re fired. You’re saying we’re fired” (transcript page 24); that she then said “Clock out and go home” (*Id.*); that she had a page that her corporate office had telephoned and she went to the office to speak with the corporate office; that while she told the employees to clock out and go home they were still employed at Bon Harbor; that she telephoned Respondent’s regional offices in Louisville, Kentucky and Milwaukee, Wisconsin and Licensing and Regulations, which is a Kentucky state agency which oversees long-term care, since there was a staffing shortage after the seven employees left; that there have been individuals who have walked off the job before but Respondent never had an entire unit walk off the job before; that the normal discipline for an employee walking off the job is termination; that she did not go home that night and she was told the news on television that night indicated that she had fired the employees; that there were four CNAs assigned to the Skilled Unit, and two to the South Unit on January 14; that Lemon tore up weight records of residents, which are legal documents, on the day of the walkout; that LPNs and CNAs do not report to her when they are going to take their break; and that she did not tell the employees who were outside on January 14 to go back in the facility and go to work but rather she told them to clock out and go home.

In response to questions of the Respondent’s Counsel, Davis testified that she saw seven employees outside Bon Harbor’s facility on January 14, namely Lemon, who was the LPN supervisor on the Skilled Unit, Adkisson, who is the LPN supervisor on the Skilled Unit, Paulin and Tammy Snyder, who are CNAs on the Skilled Unit, Kelley and Kjelsen, who are CNAs on the South Unit, and Hamilton, who is a CMA on the West Unit; that while Adkisson was not outside when the group of employees first went out, Adkisson went out after Davis told the employees to clock out; that Adkisson told her “I have to” (transcript page 46); that Lemon came to work late that morning; that Hamilton had been pulled from Lemon’s unit to work on another unit; that when she went into the parking lot Channel 25 representatives were there and Chris O’Nan, who is a reporter for the Messenger Inquirer - the local newspaper, was there; that she asked the media to leave Bon Harbor’s parking lot; that she asked the employees to come back into the facility and clock out; that she did not tell the employees that they were discharged or fired; that it was her opinion that the employees should have been working when they were in the parking lot; that if an employee leaves the building, they are supposed to clock out; that Lemon said “So you’re saying we’re fired” (transcript page 52); that Lemon asked the media “Are you getting this on camera” (*Id.*); that she then said “clock out and go home” (*Id.*) while she was standing, holding the front door open; and that the movement of Hamilton and the perceived short staffing on the units on January 14 was not anything out of the ordinary.

The following appears on pages 62 and 63 of the transcript:

MR. NIERMAN: Respondent is willing to stipulate that the job action was a response or was motivated by short staffing or at the point of short staffing.

MR. BECK: We’ll enter into that stipulation.

MR. NIERMAN: We’ll stipulate that the employees walked out on the day in question to protest short staffing.

MR. BECK: That’s fine.

JUDGE WEST: Accepted. [Emphasis added.]

Kjelsen, who is a CNA at Bon Harbor, testified that she was fired on January 14; that on

January 14 “[a] group of girls were going to talk about 10 o’clock and get together on our breaks” (transcript page 66); that they were going to discuss short staffing in the facility; that when they went out the front of the facility she noticed Lemon speaking with a camera crew; that Davis came out of the facility and told the camera crew to get off the property; that Davis told the employees who were outside to “get our things and clock out and go home” (transcript page 68); that Lemon asked Davis ‘Did you say that we were fired’ and Davis said ‘Yes’ (*Id.*); that she got her things, clocked out and went home; that she had not clocked out before she went outside on her break; that she had not taken a break that morning before she went outside and this was her first break; and that she was wearing her jacket because it was cold outside but her other things were inside. On cross-examination Kjelsen testified that before going outside on January 14 she did not know that the media was there; that they had “discussed something about it, but ... [she] didn’t expect it to be our there” (transcript page 73); that when she went outside she took her jacket and purse (transcript pages 73 and 74); that the discussion about short staffing began inside where units connected and then the involved employees went outside to discuss short staffing; that on January 14 she worked on the West unit and reported to Lisa Brown; that she told Lisa Brown that she was going on break; that she has taken a break in the parking lot before either eating in her car or standing in the parking lot talking to people; that what looks like a purse hanging over her right arm in the picture in the newspaper article, Respondent’s Exhibit 2, is her lunch bag; that the newspaper article is not accurate in indicating that the employees walked off the job in that she did not walk off the job but rather she was fired; that when she left the building she was on a break; and that she intended to come back to work at the end of her break. Subsequently Kjelsen testified that when she takes 15 minute breaks in Bon Harbor’s parking lot she does not clock out; that she was not aware of any policy requiring an employee to clock out in this situation; and that if an employee leaves the facility and the property for a 30-minute lunch break they are required to clock out.

Adkisson, who was a LPN Charge Nurse, testified that on January 14 after she arrived at work at 6:45 a.m. she and some of the employees were discussing how short staffed they were; that this discussion occurred on the West unit in the hallway; that some of the employees wanted to have a sit in in the break room; that Lemon and Norma Young, who is the 11 p.m. to 7 a.m. Charge Nurse, were discussing the fact that the 3 p.m. to 11 p.m. and the 11 p.m. to 7 a.m. nurses were getting paid more than the 7 a.m. to 3 p.m. nurses because of the shift difference; that Young got upset and she and Lemon had words; that Lemon locked her med cart and went up front to talk with Steward and Boehman in their office; that she was present during this discussion and Steward and Boehman told Lemon, who was crying, to take an hour break and get herself together; that she and Lemon went back on the floor; that Lemon and some other employees telephoned the media and it was agreed that at 10 a.m. the employees would meet out front and talk to the media in the parking lot; that the media was contacted because the employees thought someone needed to know how short staffed they were and the care that the residents were receiving; that 10 a.m. was chosen because the employees were going to take their break after the first bed check and breakfast; that she had just received her yearly evaluation and she was discussing it with Davis at the nurses station on the Skilled Unit when Davis received a telephone call from Renfro, who told Davis that she needed to get up front because there were people out front; that Davis asked her if she knew anything about this; that Davis then left the nurses station; that she then continued to look at her evaluation for a few minutes; that after a few minutes she went to the front door and looked out; that she punched the code and Steward opened the front door; that she heard Davis (1) telling the media that they had to leave because it was private property, and (2) asking the employees if they were still on the clock; that Davis told the employees to clock out and go home; that Lemon asked Davis ‘Are you firing us,’ Davis’ head moved up and down, and Lemon said ‘Are you all still getting this on tape’ (transcript page 93); that Davis told Steward and Boehman to take the involved employees’ key and go out on the floor; that she was still standing at the door and she asked

Steward “Are you talking about me” to which Steward replied “You heard what ... [Davis] said” (transcript pages 93 and 94); that she took her keys out of her pocket and Steward took them out of her hand; that the involved employees asked Steward and Boehman if they wanted help counting meds and with the report, which is a state regulation, but Steward and Boehman said
 5 no and to get out of the building; and that she got her purse and jacket and left. On cross-examination Adkisson testified that Hamilton was with Lemon when Lemon contacted the media; that she and Lemon were the two LPNs; that it was not unusual for the two LPNs to take a break at the same time; that she had noticed in talking with Davis on any routine subject that Davis tends to nod her head a lot; and that she did not witness Lemon tear weight records on
 10 January 14, and it is not possible that she told Steward this. Subsequently Adkisson testified that Steward was aware that she remained inside throughout the entire incident in the parking lot on January 14.

Lemon, who as noted above was an LPN Charge Nurse at Bon Harbor, testified that she
 15 had followed the chain of command several times to try to complain about short staffing, nothing was getting done, and it was decided to contact the media; that on January 14 when she arrived at work the CNAs were short; that she started working, she became overwhelmed, and she spoke with Adkisson; that she then went to the office to tell a supervisor that she needed to leave; that she told Steward and Boehman that she only had two CNAs, she could not take it
 20 anymore, and Steward needed to come with her to count meds because she was leaving; that she usually has three CNAs, two nurses, and one CMA, and, on a good day, there are four CNAs; that Steward asked her if she could leave for one hour and come back because if she left for the day it would make the unit short; that she told Steward that she had already taken her nerve pill, she was crying, and she went back to the floor with Adkisson; that six or seven of the
 25 employees met in the hallway between the West and Skilled units, they discussed short staffing, and decided to contact the media and speak to them at 10 a.m. when they took their break; that when Davis came to the nurses station and was speaking with Adkisson, she went outside and talked to the media; that Davis asked the employees who were outside if they were on the clock, and they told her yes they were on their break; that Davis told the media that they needed to
 30 leave the premises and the police had been called; that Davis told the employees that they needed to come in and clock out; that she then asked Davis “So are we fired” and Davis said “Yes, you’re fired. Go clock out” (transcript page 108); that Davis told the supervisors to take the keys and “hit the floors” (*Id.*); that the involved employees went back to the floor to get their purses and coats; that she asked Steward to help her count the narcotics and make a report but
 35 Steward refused and told her to go; that she got her purse and went with Adkisson to Davis and told her that Steward refused to count drugs and get a report; that she asked Davis if she was going to be charged with abandonment and Davis said no but she needed to go; and that she then went outside and talked to the media across the street. On cross-examination Lemon testified that when she first walked out she did not have her purse with her and she did not
 40 recall whether she was wearing her lab jacket; that she did not have her purse because she was not leaving the facility but rather she went outside to talk with the media; that she was not walking out and staying out until such time as Bon Harbor fixed staffing; that between 9 and 9:30 a.m. she decided to contact the media and she telephoned newspaper reporter Chris O’Nan and a television station, Channel 25 News; that she told the newspaper person who
 45 answered the telephone that “we were having short staffing issues and that we were wanting to talk to the media about it” (transcript page 115); that she explained to the person who answered the telephone at the newspaper that the employees had been complaining for three months straight; that she said the same thing to Channel 25; that she did not tell anybody that the employees were going to walk out; that she told the media that the employees were going to be
 50 taking a break at 10 a.m.; that it is not a normal practice for the two LPNs on the Skilled Unit together to leave the floor to go on break; that she and Adkisson did not leave the floor together; that after Davis told the involved employees to clock out and go home, she asked Davis twice if

she was saying that the involved employees were fired and Davis said 'Yes, you're fired. Go' (transcript page 122); that when Davis said this she was holding the door open for the employees as they were walking in; that she did say at the front door to the media 'Are you getting this' when she and Davis were speaking; that the January 15 newspaper article is inaccurate when it indicates (1) "left their patients and walked off their job" (2) "After returning to the nursing facility to clock out, the nurses were fired, said Norma Lemon", (3) Jennifer Hurt said she was not made aware of it [short staffing], and (4) her discussion with the media on January 14 had nothing to do with low pay, "I was paid enough" (transcript page 125); that the employees left the floor on their break time to talk to the media and the employees were fired as they walked in the door; that she anticipated that she might be fired for talking to the media; and that she was sure that on January 14 she did not tear the resident/patient weight records. On redirect Lemon testified that Bon Harbor did not have a set policy or schedule for when CNAs take breaks; that she gets two 15-minute breaks and one 30-minute lunch break; and that on January 14 prior to going outside and meeting with the media she had not taken her break.

Kelley, who is a CNA at Bon Harbor, testified that on January 14 she arrived at work at 6 a.m. and she worked on the South Unit, which had two CNAs assigned to it, namely her and JoAnn Morreman; that Donna Brown was on the unit as the LPN; that normally three CNAs work on the South Unit and, therefore, they were one CNA short on the morning of January 14; that for the past couple of months there were just two CNAs on the unit; that she had complained to Donna Brown; that she discussed short staffing on the morning of January 14 with Paulin and Kjelsen; that Paulin said that they were going to go out and talk with the newspaper reporters and the TV people about 10 a.m.; that she agreed to join in; that normally she took lunch at 10:30 a.m.; that she was going on her lunch break when she went out front at 10 a.m.; that she already had taken her 15 minute morning break before 10 a.m.; that the reporters were there when she went outside; that Davis came to the door and the only thing that she heard Davis say was "for us to go get our belongings, clock out, and get off the premises" (transcript pages 141 and 142); that she was away from the main group, she had been smoking, and she was putting out her cigarette; that they were saying that Davis said that they were fired but she never heard Davis say this; that she went inside, got her stuff, and left; and that she went outside, talked to the reporters, and went home. On cross-examination Kelley testified, with respect to Respondent's Exhibit 2, that the five employees in the picture are herself, Kjelsen, Tammy Snyder, Paulin, and Lemon; that the normal practice is to clock out for lunch but she did not clock out at 10 a.m. on January 14; and that she did not recall any conversation with Donna Brown before she left.

Hamilton, who is a CMA at Bon Harbor, testified that on January 14 she arrived at work at 6:45 a.m.; that she was assigned to the West Unit, along with two nursing assistants; that no LPN was assigned to that unit; that several times in the past she has been on a unit where there was no nurse assigned to that unit; that for about six months before January 14 there had been an issue with staffing at Bon Harbor; that she had complained about the staffing issues to Hurt a month or two before January 14; that her conversations with Hurt took place in Hurt's office and Hurt said 'She could run that unit back there with one CNA if she wanted to' (transcript page 150); that on January 14 the CNAs on her hall, Kjelsen and Dorothy Simmons, asked her to see if she could get them some more assistance; that she also discussed staffing that morning with the nurses on Skilled and the CNA on Skilled; that they discussed speaking with the Administrator; that at about 9 a.m. Paulin told her that the media was going to be there about 10 a.m.; that she takes lunch at 10:30 every day so that she can go to see her husband who works at Field Packing Company; that at 10 a.m. she went to the South Unit and gave her keys to nurse Donna Brown and told her that she was going to lunch; that she clocked out and went out to the parking lot; that she heard Lemon make a few statements in the parking lot; that as she

was saying “its about my time to go” (transcript page 152) and was walking to her car and unlocking the door, she heard Davis ask if the involved employees were on their time, and they needed to come in, clock out, and get off the premises, and Lemon ask “Did you say we were fired” (transcript page 153); that she did not hear Davis’ reply; that she hollered that she would be right back, she met her husband, and returned with him, apparently in separate vehicles, to Bon Harbor; that she was gone not even 5 minutes since her husband was waiting for her at the gate to change vehicles; that she went into Bon Harbor since her husband had told her that it was against the law to be fired like that and she should go in; that she was stopped by Steward and Renfro and one of them told her that if she had talked to the media, she would be fired; that she said “they said that we were fired. I heard Norma Lemon. I’m just trying to figure out what’s going on” (transcript page 154); that she was still on her lunch break and she decided to go outside and talk to the media; and that she left the facility and spoke with the media. On cross-examination Hamilton testified that she did not recall whether it was Steward or Renfro who said that if she had been out there talking to the media, she would be fired; and that while the affidavit she gave to the Board in February 2004 indicates that Steward made this statement, she was upset at the time and she could not say for sure that it was Steward.

Paulin, who is a CNA at Bon Harbor, testified that she worked on the 6 a.m. to 2 p.m. shift on January 14 on the Skilled B hall unit; that at 7 a.m. CNA Amanda Morris came in to her unit, and at 8:45 a.m. CNA Tammy Snyder came to her unit; that from 7 a.m. to 9 a.m. she and Morris were the only CNAs on the unit; that LPN Adkisson was on the back hall and LPN Lemon was on the front hall; that usually there are four or five CNAs on the Skilled Unit; that there had been a problem with short staffing prior to this and she had complained about it to Hurt on numerous occasions; that she discussed the short staffing problem with employees on January 14 and before that; that on January 14 the employees discussed talking about the problem with Hurt but then it was concluded that they would get nowhere discussing it with Hurt; that she was present when Lemon contacted the newspaper and a TV station; that it was decided to talk to the media at 10 a.m. because everybody would be ready to take a break or lunch; that the plan was communicated to Hamilton, Tammy Snyder, Adkisson, Kelley, Dorothy Simmons, Morreman, and pretty much almost everybody that was in the building; that at about 10:15 a.m. she and Lemon, Adkisson, Tammy Snyder, Kelley, and Kjelsen went outside; that she did not bring her purse or her coat with her when she went outside; that the camera crew was set up in the lobby and Davis told them that they needed to get off the premises, get out of the inside; that she followed the camera crew outside; that Davis then came outside and asked the employees if they were on the clock and most of the employees responded they were; that Davis said that the involved employees needed to clock out and get off the property; that Lemon then asked “Are you firing us” (transcript page 168); that Davis said “Yes, you’re fired. Clock out and get off the premises” (*Id.*); and that she went into the facility, got her belongings, clocked out at 10:22 a.m., and went outside and spoke with the media. On cross-examination Paulin testified that when Lemon asked Davis if the involved employees were fired Davis replied “Yes, you’re fired. Clock out and leave” (transcript page 178); and that she did not have any of her belongings with her when she first went outside.

When called by Respondent, Davis testified that Lemon asked on January 14 if the involved employees were fired, she told the employees to clock out and go home, and she did not tell anyone that they were fired or discharged from employment; that media is not allowed at the facility because of resident’s rights; that by telling the involved employees to leave she did not intend to terminate them; that she had never had this happen before; that she has told employees to go home while the Respondent investigates allegations of abuse or neglect but in those instances she would suspend the employee for five days pending investigation; that after she told the involved employees to leave on January 14 she called her corporate office; that she regarded the involved employees who were sent home as active employees who were not

working; that she contacted Channel 25 in Evansville, Indiana and obtained a copy videotape of the coverage of the January 14 incident, *inter alia*, Respondent's Exhibit 8; that regarding the involved employees, she would not think that that amount of staff would be on break at that one time on January 14; that it is not common for that many people from the involved units to leave the facility at the same time; that it is unusual that both LPNs would leave the Skilled Unit at the same time; and that based on her investigation she never concluded that the involved employees were all on break. On cross-examination Davis testified that while she responded to Lemon's question as to whether she was saying they were fired, she only said "To clock out and go home" (transcript page 197) and did not say "Yes. Get your things and go" (*Id.*); that she did not say anything to let the involved employees know that they were not fired when Lemon asked more than once if the involved employees were fired; that while it was not her intent to terminate these employees on January 14, she did not explain to these employees why they were sent home, and she did not communicate to the involved employees in any way on January 14 that they were not fired; that she did not explain to the involved employees what their job status was when she told them to clock out, get their things, and go home; that it is against Company policy to have the involved employees on break at the same time in view of the staffing that would be available; that the policy is not memorialized in any of the Company's employee handbooks; and that such policy has not been communicated to employees but it is directed by their Charge Nurse. Subsequently Davis testified that after she asked the TV crew to leave the parking lot they were in the lobby of the facility in that "she came into the lobby." (transcript page 201)

Steward, who is a registered nurse and the Nurse Manager on Skilled and West Hall, testified that on January 14 while she was standing in the front lobby of Bon Harbor she heard Davis tell the involved employees to come back in, clock out, and go home; that she heard Lemon say to get this on tape; that she did not recall having a conversation with Hamilton on January 14 where Hamilton was inquiring about her job status; that she did not say to Hamilton that "if she had talked to the media or her face was on the media, she would be fired" (transcript page 203); that Respondent's Exhibit 4 are ripped weight records which she found at Lemon's desk on January 14 right after Lemon walked out; that it was not after Lemon came back to get her belongings and leave for good but rather it was when Lemon first walked out about 10:15 a.m.; and that she did not see who ripped the records. Subsequently Steward testified that she found the ripped documents before Lemon came back into the facility at Davis' behest; that she was in the lobby when Lemon came back into the facility at Davis' behest; that she heard what Davis told the employees when they were coming back in; that while ripping such documents is a very serious matter, she did not say anything to her in the lobby when Davis was bringing the involved employees back into the facility because of the commotion; and that she brought it to the attention of Davis shortly thereafter.

Boehman testified that on January 14 she was in the lobby when the involved employees were returning back from being outside; that she could not hear what the employees were asking Davis but she did hear Davis say 'No. I said to clock out and go home.' (transcript page 212); and that she never heard Davis say "you're fired" (*Id.*). Subsequently Boehman testified that employees were asking questions as they came back into the facility and while she could not hear the questions, she is sure that Davis said 'No. I said to clock out and go home' (transcript page 214); and that she heard Davis say "No" (transcript page 215).

When called by Counsel for General Counsel Davis testified that while the seven above-described employees were scheduled to work on January 15, none of them came to work or called in; that an article in the local newspaper that morning indicated that these employees stated that they had been fired; that after two no call/no shows, an employee could be terminated; that Respondent sent letters to all of these employees to let them know that they were not fired; that she discussed the letter with Respondent's regional people and the Human

Resources department; that she believed that the incident, along with the employees' belief that they were fired, was covered on the television news on the night of January 14; that the first discussions she had with anyone about sending the employees a letter telling them that they had not been fired occurred on January 15; that she, Hurt, Respondent's Regional Director of Operations, and a Human Resources person, along with Respondent's legal department, made the decision to send the letter; that conditions were place on the employees coming back in that they had to come back unconditionally and also agree not to walk out in the event of some future short staffing; that if the employees did not agree to these conditions, they would not come back to work, they would still be considered employees of Bon Harbor, but they would not be scheduled any hours; that Bon Harbor's legal department made the decision to place these conditions on the employees returning to work; that the discussions with the legal department about the conditions for returning to work occurred later on the day the letter was sent out; and that despite the fact that Lemon allegedly tore up weight records on the day of the walkout, she would have been put back to work if she had agreed to the conditions.

Respondent's Exhibit 3 is a copy of a newspaper article. As here pertinent, it reads as follows:

Bon Harbor nurses fired after walkout

Six leave nursing facility over pay and staffing complaints

01/15/04

By Chris O'Nan
Messenger-Inquirer

Citing understaffing and low pay, six members of the nursing staff at Bon Harbor Nursing and Rehabilitation Center left their patients and walked off the job Wednesday.

The walkout resulted in their firing by Director of Nurses Carolyn A. Davis, who followed the women to the parking lot and told them to clock out before leaving. After returning to the nursing facility to clock out, the nurses were fired, said Norma Lemon, a licensed practical nurse and one of those fired.

Hamilton testified that she returned to Bon Harbor on January 15 with Lemon to pick up her check stub; that Davis asked them to come into her office, told them that they were not fired, and that they could come back if they came back unconditionally and agreed not to walk out again if Bon Harbor was short staffed; that she and Lemon could not answer the questions with just a yes, and they left Bon Harbor; and that she could not answer the question with a yes because she did not walk out the first time.

When called by Counsel for General Counsel, Davis testified that while the seven above-described employees were scheduled to work on January 16, none of them came to work; that she did not know if any of the seven employees called in on January 16; and that none of the employees were disciplined for not showing up for work or calling in on January 15 and 16.

By letter dated January 16, Respondent's Exhibit 1, Davis advised Tammy Snyder as follows:

I saw in the newspaper a report that you have been terminated. This is not correct.

On Wednesday, January 14, you and several other employees walked off the job complaining about staffing. My concern was that you were not working while you remained on the clock. It was never my intention to suggest that you were terminated.

5 If you intend to return to work, please contact me.

Hamilton testified that she and Paulin went to Bon Harbor on January 16 because apparently a newspaper article indicated that the involved employees were not fired and they were still employed by Bon Harbor; that there was a full staff meeting that Friday and when they attempted to go to it Davis would not allow them to attend that meeting; that Davis asked them to come to her office and asked them if they could answer the two questions; that this time she said yes to the two questions, namely that she would come back unconditionally and that she agreed not to walk out if Bon Harbor was short staffed, "but I did not walk out the first time" (transcript page 156); and that she returned to work at Bon Harbor the following Tuesday.

15 Paulin testified that on Friday morning, January 16, the involved employees met at Shoney's and O'Nan, who was present, told them that she had talked with Davis and the employees would be getting a letter indicating that they were not fired; that later that day she went to Bon Harbor with Hamilton because there was a full staff meeting; that Davis saw them in the facility and told them they were not allowed to attend the full staff meeting; that she asked Davis why they could not attend the staff meeting if they were not fired; that Davis took them to her office where Ann Snyder asked them if they would come back unconditionally and not walk out the next time Bon Harbor was short staffed; that she answered yes to both questions and added that Davis fired them; that Hurt, who was present for this meeting, told her that she would call her after she called Extendicare to see if she was able to return to work; and that she returned to work the next day. On cross-examination Paulin testified that Lemon was at the meeting at Shoney's.

30 Kjelsen testified that she did not receive a letter from Bon Harbor but Kelley, who is a CNA, told her about the letter and she went with Kelley to Bon Harbor to meet with the Acting Administrator Hurt; that Hurt asked Kelley if she would come back unconditionally and whether she would walk out "if any conditions were as they were and would ... [she] walk out on any conditions" (transcript page 71) and Kelley answered "yes"; and that when Hurt asked her these questions she believed she said "no." On cross-examination Kjelsen testified that Cathy Head, a corporate Human Resources person, may have been present at this meeting; and that when she was asked if she would leave under the same conditions it meant the staffing situation.

40 Kelley testified that she received a certified letter from Davis indicating that the involved employees were not terminated and she should set up an appointment to talk with Davis and Hurt; that she went to Bon Harbor with Kjelsen; that Hurt and Davis asked them two questions, namely would they walk out if they were short staffed again, and would they come back with no demands; that she answered yes to both questions indicating that she wanted to be able to go back on the same floor and still have all her benefits and stuff; and that they told her to return to work.

45 Kjelsen testified that one week after meeting with Hurt, she telephoned Acting Administrator Ann Snyder and asked her if she could come in and talk with her; that Snyder asked her the same two questions and this time she replied "yes"; and that she was then told to come back to work the next day on South wing.

50 Adkisson testified that on January 20 she received a certified letter from Bon Harbor indicating that she was not fired; that she went to Bon Harbor to pick up her paycheck and

asked two ladies from corporate who were standing there if it was convenient to speak with Davis; that she was told that it was not convenient since Davis was in a meeting; that she went to Bon Harbor twice and telephoned once but “never once was I talked to” (transcript page 96); and that she did not attempt any other contact after these efforts. On cross-examination

5 Adkisson testified that she took employment elsewhere two days after January 14.

Lemon testified that she received a certified letter from Davis indicating that the involved employees were not terminated and she should set up an appointment to talk with Davis; that the following week she returned to the facility and met with Davis, Ann Snyder, who is one of the corporate ladies, and Hurt; that Ann Snyder asked her if she would not walk off the job again if they were short staffed and would she come back unconditionally; that when she tried to answer the questions she was told it had to be a simple yes or no, and she told them she could not answer because that would make her guilty of abandoning her patients; that she was told that she had to leave the facility and she could return when she could answer the questions; that

10 subsequently she tried to visit patients that she had taken care of at Bon Harbor and she was escorted out; and that when she went to visit with one patient she was taken to the office and she heatedly spoke with the administrator about staffing and patient care.

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Paulin testified that about one week after January 14 the United Steel Workers of America contacted Lemon; that she attended a meeting at the Union’s hall; that a decision was made to attempt to organize the Bon Harbor employees; that she attended weekly meetings, wore a union button to work every day, and passed out flyers in front of Bon Harbor’s building; that Ann Snyder told her to move to the street; and that she posted union material on the bulletin board inside the employee break room.

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When called by Counsel for General Counsel, Davis testified that Lemon was terminated because she was called on two separate occasions to come into the facility, Lemon came in, but her behavior was disruptive; that on one particular incident Lemon went into a patient’s room, took his arm, cursed, and was out of control; that during the two meetings Lemon refused to accept the two above-described conditions and therefore she was not put back to work; that she and corporate Human Resources decided to terminate Lemon; that she calls Human Resources before she terminates any employee; that, in addition to the two times Lemon came in to discuss coming back to work, Lemon came to the facility two times; that there were written reports about Lemon coming into the facility, throwing paper into the air and cursing on a unit with residents present; that Lemon’s conduct was not reported to Licensing and Regulation but she escorted Lemon out of the building; that she did not feel Lemon’s conduct was serious enough to report to Licensing and Regulation; and that the first time Lemon came to the facility to discuss the conditions was within a week of January 14, and the second was probably a few days after that.

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In response to questions of the Respondent’s Counsel, Davis testified that she was present at both meetings when Lemon refused to agree to the above-described conditions; that she viewed Lemon as a supervisor; and that she believed that Lemon lead the CNAs out of the facility and this was taken into consideration in the decision to terminate Lemon.

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By undated letter, Respondent’s Exhibit 3, Davis advised Lemon as follows:

Extendicare holds itself and each of its employees, particularly its supervisory Charge Nurses, to the highest standards. It is an obligation we owe to our residents and the families who have entrusted Extendicare with their loved ones’ care. When on duty, the Charge Nurse is accountable for the Nursing Assistants reporting to her, and the care of the residents on her unit.

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On January 14, 2004, when working as the supervisor on the skilled care unit, you consciously decided to walk off the job, and encouraged or instructed Nursing Assistants to walk off the job. You abandoned your residents. Over the past two weeks you were
 5 twice asked whether you would assure us that you would not do this again. Your refused to give us such an assurance on both occasions.

We have reviewed the events of the past two weeks, including the events of January 14 and your employment history at Bon Harbor. We have determined as a supervisor you did not have a legal right to walk off the job, and that your continued employment is not
 10 consistent with Extendicare's policies and the obligations Extendicare owes to our residents and their family members. Effective Wednesday, January 28, 2004, your employment with Extendicare is hereby terminated.

15 Davis testified that she believed that this letter was sent on January 29. The employee separation form for Lemon, which was signed "2/2/04" and is page 2 of Respondent's Exhibit 3, indicates that Lemon quit and the primary reason was job abandonment.

20 When called by Counsel for General Counsel, Davis testified that Bon Harbor engaged in activity in order to make its opposition to unionization known to its employees in that it held mandatory employee educational meetings.

Hamilton testified that there is a bulletin board in the break room at Bon Harbor; that the break room is used by employees and not by the public; that the employees use the bulletin
 25 board to post ads regarding the sale of cars, uniforms, dogs and cats, and furniture, etc.; that she posted an ad of the sale of a uniform on the bulletin board and she did not clear it with management before putting it on the bulletin board; that her ad remained on the bulletin board until she took it down after 4 weeks; and that no one from management ever told her that she needed to have items cleared before she could hang them up on the bulletin board.

30 Paulin testified that on March 18 she saw some of the union material that she posted being removed by Boehman from the bulletin board in the employee break room at Bon Harbor; that she told Boehman that it was against the law for her to remove the union material; that Boehman said that Ann Snyder said that she could remove the material because Bon Harbor
 35 was privately owned; that she told Boehman she was given a little notebook from the Union to write down things that happened and she was going to write this down in her book; that later that day she had a meeting with Boehman in her office; that Boehman had Donna Brown as a witness so she got Kim Stout, an LPN, as her witness; and that the following transpired:

40 She told me that - - she had the employee handbook out and she said it was against the rules to hang up stuff, unauthorized by the administrator, in the employee break room. And I told her ... I've hung up stuff on there before. Just because we were in an organizing drive doesn't mean the rules can change. And then she told me that I was getting a verbal warning and I said what for. And she said for threatening a
 45 supervisor. [Transcript page 174]

Paulin further testified that she asked Boehman what she meant by threatening a supervisor because she was writing it down in her notebook; that she had posted material on the bulletin
 50 board before, namely a baby bed for sale and a garage sale, and she had not cleared either of these ads with management before posting them; that no one ever told her that she was supposed to have ads cleared by management before posting them on the employee bulletin board; that after this meeting she posted an ad for a car for sale with a fake telephone number

to see if it was removed; that she did not clear the car ad with management; and that the car ad remained up on the employee bulletin board for over a month until she took it down. On cross-examination Paulin testified that after March 18 she posted union related material on the employee bulletin board in the employee break room and some had been removed but lately it was not removed; that with respect to those materials which were removed after March 18, she did not know who removed them; and that she received a handbook, Respondent's Exhibit 5, as a new hire five years ago. As here pertinent, the handbook reads as follows:

Bulletin boards are used by the company to provide information such as announcements, changes of programs, revised or additional personnel policies, and the posting of work schedules. If your facility allows employees to use the bulletin board, all material posted must be approved and initialed by the administrator before it is posted. You are responsible for checking the bulletin board regularly. Posted information will only be removed by the appropriate business office staff or supervisor. Unauthorized material will be removed.

Davis testified that Paulin was verbally warned for violating Item 6 of Class I Offenses of the Disciplinary Action Procedure, Respondent's Exhibit 6. The item reads as follows: "Minor disrespect to any employee, supervisor, or any other individual in the facility." Six examples of other employees disciplined under this item were received as Respondent's Exhibit 7.

Boehman, who is the LPN Nurse Manager, testified that on March 18 she entered the break room and began taking literature off the bulletin board; that Paulin asked her if she knew what she was doing was against the law; that she told Paulin that she did not believe that it was against the law and she was doing what her supervisors had told her to do; that Paulin told her that she could show her in some book where it was against the law, and she told Paulin that she was not going to debate this issue with her in the break room and if Paulin wanted her to come to her office she could; that Paulin chose not to instead "she stood up and put her hands on her hips and raised her tone of voice and said that, 'I hope you know that everything you're saying to me right now I'm writing down in my little white book' " (transcript page 210); that she told Paulin "[t]hat is your choice. You can do that" (*Id.*); that she told Paulin that she needed to speak with her and they went back to her office; that Donna Brown was in the office and Paulin requested a witness, Stout; that she showed Paulin the handbook (a) requirement for preauthorization to post on the bulletin board, and (b) reference to disrespect to a supervisor; that she told Paulin that she was giving her a verbal warning, telling Paulin that she did not appreciate Paulin's attitude toward her in the break room; that Paulin was disrespectful because she argued in the break room in the presence of other employees, raised her tone of voice, and kind of snickered when she said that it was against the law; and that Paulin is not the only person that she has written up for disrespect to a supervisor. On cross-examination Boehman testified that Davis told her to remove the union literature from the bulletin board after Davis discussed it with Ann Snyder; and that Davis did not instruct her to remove anything else from the bulletin board. Subsequently Boehman testified that she is in the break room several times a week; that she has seen items for sale on the bulletin board; that she did not know whether the employee who posted the item for sale on the bulletin board received preauthorization from the administrator; and that this was the first time she was asked to remove something from the bulletin board.

Donna Brown, who is an LPN on the Skilled Unit, testified that on March 18 she was in the break room when Boehman took down some union postings; that after Boehman took down the union postings Paulin stood up and said that that was against the law to do that; that Boehman responded that she was only doing what she was told to do and Boehman told Paulin that they could talk about it in her office; that Paulin, who was sitting, stood up, put her hands on

her hips and then folded her hands, her face got red, her tone of voice was loud but she was not yelling, and she repeated the statement that it was against the law what she was doing; and that “yes,” (transcript page 217) based on her experience as a supervisor she felt Paulin was being disrespectful.

By Decision and Direction of Election dated April 27 in Case 25-RC-10230 Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center, Joint Exhibit 1, the Regional Director of Region Twenty Five of the National Labor Relations Board (Board) concluded that the Employer had not met its burden of proof that Licensed Practical Nurses are supervisory employees within the meaning of Section 2(11) of the Act. Licensed Practical Nurses were included in the unit found appropriate in that Decision.³ The Employer’s Request for Review of the Regional Director’s Decision and Direction of Election was denied by Order of the Board dated May 26, with Chairman Battista dissenting. Joint Exhibit 2. The request was denied for the following reason: “it raises no substantial issues warranting review.” Counsel for General Counsel and the Respondent also stipulated that during the relevant time period Adkisson and Lemon held the position of LPN Charge Nurses, and possessed the same duties and responsibilities as other LPN Charge Nurses.

Analysis

Paragraphs 5(a), (b), and (c) of the complaint collectively allege that about January 14, Respondent discharged employees Kelley, Kjelsen, Paulin, Lemon, Adkisson, Hamilton and Tammy Snyder (1) for engaged in concerted activities with each other for the purposes of mutual aid and protection, by gathering together at Respondent’s facility during their break to protest staffing conditions and complain to the news media about their terms and conditions of employment, and (2) to discourage employees from engaging in these or other concerted activities. Counsel for General Counsel on brief contends that the six of the seven involved employees went outside of the Respondent’s facility during the employees’ normal break time to complain to the news media about Respondent’s persistent failure to schedule adequate staff to handle the workload at Respondent’s facility and the seventh was just in the area when the complaints were made; that contrary to Respondent’s position, the evidence shows that these employees were discharged in that several employees were actually told they were discharged and all of the involved employees were told to go home and were not allowed to return to work until they agreed to the certain unlawful conditions; that an employer violates Section 8(a)(1) of the Act if it knew of the concerted nature of the employees’ activity, the concerted activity was protected under the Act, and the adverse employment action at issue was motivated by the employees’ protected activity, *Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 709 (1999); that in *Hacienda De Salud-Espanola*, 317 NLRB 962 (1995) the Board found an employer violated the Act when it discharged a group of certified nurses aides who left their posts en masse in order to air their work-related grievances about staffing with a news reporter, even though some of the employees were not on break at the time; that all of the employees who testified that they

³ The Decision found that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses, certified medication assistants, certified nursing assistants, dietary, housekeeping, laundry, and activities employees employed by the Employer at its Owensboro, Kentucky facility; BUT EXCLUDING all office clerical employees, directors of nursing, unit managers, MDS coordinators, staff development coordinators and all guards and supervisors as defined in the Act.

intended to return to work at the end of their break, which was demonstrated by the fact that they left their personal items in Respondent's facility when they exited the building to speak with the media; that when she returned from her lunch break which was taken away from the facility, Hamilton was told by either Steward or Renfro that if she had talked to the media, she would be fired; that additionally, Davis' statements and conduct led the employees to believe that they had been discharged in that she told them to clock out and get off the premises, and she did not deny Lemon's statements made in Davis' presence that the employees had been discharged and Lemon's questioning as to whether the camera operators had seen it, *Accurate Wire Harness*, 335 NLRB 1096 (2001); and that Adkisson was discharged on the mistaken belief that she also had engaged in the protected activity which violates the Act, *Metropolitan Orthopedic Association, P.C.*, 237 NLRB 427 (1978). Respondent on brief argues that the seven involved employees were not discharged on January 14; that Davis told the involved employees⁴ who walked off the job without first clocking out, to come into the facility, clock out, and leave the premises; that Respondent's Exhibit 8, the videotape of the incident, does not show Davis saying "yes"; that the Board has held that the fact of discharge does not depend on the use of formal words of firing, *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977); that the determination of whether there was a discharge is judged from the perspective of the employees, and the issue is whether the employer's statements or conduct would reasonably lead employees to believe that they had been discharged, *John Kolkka*, 335 NLRB 844 (2001); that the employees could not have reasonably believed that they were discharged; and that on January 14, 15, and 16 the employees were treated as striking employees who had not unconditionally offered to return to work.

For some time the employees had been complaining to management about the burdens that were being placed on them and the residents by short staffing, that is, not having a sufficient number of employees at the facility. Administrator Hurt did not testify to deny that employees complained to her about the short staffing and when Hamilton complained to her about short staffing Hurt said '[s]he could run that unit back there with one CNA if she wanted to.' Respondent's Director of Nursing at the involved facility, Davis, described the staffing on each of the units as of January 2004. None had just one CNA. Hamilton's testimony is credited. Respondent knew about the short staffing problem, employees complained about the short staffing problem, and the response they received from management was that even with the shortages, Respondent did not need as many CNAs as it was then using. In other words, the employees were being told that if they thought that the situation was bad, management could make it worse. On the morning of January 14 Lemon, who was crying at the time, went to Steward and Boehman to complain that she only had two CNAs, she could not take it anymore, and she was overwhelmed. Usually Lemon had three CNAs, two nurses, one CMA, and on a good day there were four CNAs. Steward told Lemon to take an hour break and get herself together. Other employees were upset about the short staffing and management's refusal to do anything about it. The involved employees discussed the matter and decided that during their break (a 15 minute break for some and 30 minute lunch break for others, depending on their hours) they would take their case to the media.⁵ The employees did not take their personal

⁴ Respondent on brief describes the involved employees as "strikers."

⁵ As Lemon testified, Respondent does not have a set policy or schedule for when employees can take breaks. The record in the representation case does have references to CNAs taking first break after breakfast and bed checks have been completed, and that it appears that break and meal periods for CNAs are designated on their assignment sheets. Respondent did not show that any of the CNAs were in violation of stated break times when they took their break on January 14 to speak to the media. Lemon's testimony is credited. Also, Respondent does not preclude employees from taking their break in the parking lot, and they do

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belongings with them when they went outside to talk to the media.⁶ The employees were not going out on strike. Obviously they intended to return to work at the end of their break. They went outside as a group to present their case to the media. As pointed out by Judge Pannier in *Hacienda De Salud-Espanola*, supra, such activity is protected by Section 7 of the Act. On the one hand, of the employees who testified about what then occurred, four of the six testified that Davis indicated “[y]es” to Lemon’s question whether Davis was firing the employees.⁷ Of the two who testified that they did not hear the “yes,” one, Hamilton, was not with the group of employees but was getting into her car to go to see her husband. The other, Kelley, testified that she was away from the main group, she had been smoking, and she was putting out her cigarette. Since Hamilton told her husband what occurred when she saw him shortly after leaving Respondent’s facility the first time that day, what Davis did and said when she came out and spoke to the employees, as relayed by Hamilton to her husband, led Hamilton’s husband to tell her that it was against the law to be fired like that, and she should go back to the facility. On the other hand, Davis, who testified that she did not answer “yes” to Lemon’s question, testified that after Lemon asked “You’re saying we’re fired” she, Davis, told the employees to clock out and go home. Davis concedes that she did not say anything to the employees on January 14 to let them know that they were not fired or to explain why they were being sent home. Davis also testified that the normal discipline for an employee walking off the job is termination, and that in the past she has told employees to go home while the Respondent investigates allegations of abuse or neglect. But in those instances Davis suspends the employee for five days pending investigation. Here the seven employees were not suspended. Two other witnesses called by the Respondent testified about what occurred on January 14. One, Boehman testified that Davis said “[n]o, I said to clock out and go home.” Boehman is not a credible witness. Davis did not assert that she said “[n]o, I said to clock out and go home.” The

not have to clock out to do this. It appears that employees are required to clock out if they are leaving the premises for their lunch break, as Hamilton did on January 14. Respondent’s employee handbook, Employer’s Exhibit 9 in Joint Exhibit 1, indicates as follows on page 15 thereof:

MEAL PERIOD

Full-time employees are allowed at least thirty (30) minutes for a meal period. The meal period is unpaid time. You must clock out for your meal period and clock in upon return to work. If you leave the facility, you must sign out with your supervisor. All meal periods will be scheduled by your supervisor. Meal time for employees working less than full time may be arranged with the supervisor.

REST PERIODS

You will be provided a paid break for every four (4) hours worked in accordance with the facility’s policies. Breaks will be scheduled by your supervisor. You must take your breaks in the designated areas and may not leave the premises during break time. [Emphasis added.]

The dictionary definition of “premises” is the building and its land. Since Davis ordered the media out of the parking lot, Respondent obviously views the parking lot as a part of its land. Therefore, the involved employees did not leave Respondent’s premises during their break, and the handbook does not contain a requirement that they clock out if they take their break in the parking lot, which appears to be a practice which - before the incident in question - was acceptable to the Respondent.

⁶ It is noted that Hamilton, who clocked out, drove her automobile to her husband’s place of employment. She took her keys and undoubtedly she also took her drivers license.

⁷ Seven employees were discharged. Tammy Snyder did not testify at the trial herein. Three of the employees, namely Kjelsen, Lemon, and Paulin testified that Davis answered “yes.” Adkisson testified that Davis nodded her head up and down when she was asked this question.

second, Steward, testified that she heard Davis tell the employees to come back in, clock out, and go home. But Steward is the one who testified that she did not say to Hamilton that “if she had talked to the media or her face was on the media, she would be fired.” (emphasis added) Hamilton, however, testified only that either Steward or Renfro said that if she talked to the media she would be fired. Renfro was with Steward. Renfro did not testify at the trial herein to deny that either she or Steward told Hamilton that if she had talked to the media she would be fired. Hamilton’s testimony is credited. Either Renfro or Steward told Hamilton, when all three were together, that if Hamilton had talked to the media, she would be fired. Renfro and Steward had to get their understanding and appreciation of the situation from management. Any employee who spoke to the media was discharged. Steward did not deny Adkisson’s testimony that Davis told Steward and Boehman to take the involved employee’s drug cart keys, and she, Steward, then took Adkisson’s key after Adkisson asked her if she was included. Steward was including Adkisson as an involved employee even though Adkisson did not go outside and talk to the media. Adkisson was in the lobby and not in her unit. I credit the testimony of the employees who testified that Davis indicated “yes” when Lemon asked “You’re saying we’re fired” The camera angle, the distance from the subjects, and the fact that apparently more than one person is speaking at the same time preclude my making a definitive determination with respect to exactly what was said based solely on the videotape. The following appears in *North American Dismantling Corp.*, 331 NLRB 1557 (2000):

The Board has held that the fact of discharge does not depend on the use of formal words of firing. *Hale Mfg. Co.*, 228 NLRB 10, 13, (1977), *enfd.* 570 F.2d 705 (8th Cir. 1978). It is sufficient if the words or action of the employer ‘would logically lead a prudent person to believe his [her] tenure has been terminated.’ *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964).

The employer’s words and actions on January 14 logically lead the involved employees to believe that their tenure had been terminated.⁸ Respondent violated the Act as alleged in paragraphs 5(a), (b), and (c) of the complaint.

Paragraph 5(d) of the complaint alleges that since about January 15, Respondent has refused to reinstate these seven employees unless they agreed not to engage in the activity described above in paragraph 5(a) or other protected concerted activity. Counsel for General Counsel on brief contends that the rehire restrictions required a waiver of the right to engage in protected concerted activity and thus violate the Act, *Bethany Medical Center*, 328 NLRB 1094 (1999); that the conditions were clearly mandatory since Lemon was never reinstated because she refused to agree to those conditions; and that Respondent’s conditioning reinstatement on a waiver of the right to engage in future protected concerted activity violated Section 8(a)(1) of the Act. Respondent on brief argues that the Board has held that where employees concertedly refuse to work to protest a working condition, and then attempt to return to work, the employer is privileged to question the employees as to their future intentions before reinstating them, and the employer can discharge the employee if she will not give assurances that she will remain on the job even if the condition she went on strike to protest continues, *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993).

To start with, the Respondent’s argument is based on a false premise, namely that the

⁸ Counsel for General Counsel has shown that the employees’ protected concerted activity was the reason for their discharge. The Respondent did not establish that the discharges would have occurred even absent the employees’ concerted activity. *Wright Line*, 251 NLRB 1083 (1980), *enf’d.* 662 F. 2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982).

employees refused to work on January 14. The employees did not refuse to work. The employees spoke to the media while the employees were on break in the Respondent's parking lot. For this they were discharged on January 14. The employees intended to return to work after the break but the Respondent's actions precluded this. As some of the employees themselves explained, the reason they did not initially agree to the conditions was that they did not walk out on January 14 but rather Davis fired them. In the situation at hand, Respondent could not lawfully require that the involved employees waive their right to engage in concerted protected activity in the future in order to be considered for reinstatement. Respondent violated the Act as alleged in paragraph 5(d) of the complaint.⁹

Paragraph 5(e) of the complaint alleges that about March 13, Respondent by Della Boehman, removed Union literature from a bulletin board at Respondent's facility despite allowing employees to post other types of nonwork-related literature on the same bulletin board. Counsel for General Counsel on brief contends that it is a violation of the Act for an employer to prohibit the posting of union literature on a bulletin board while allowing other types of nonwork-related items to be posted, *Benteler Industries*, 323 NLRB 712, 714 (1996); that an employer cannot remove union material from a bulletin board because of its content while allowing other nonwork items to remain posted, *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 51, (1977); that there was no evidence offered that Respondent ever followed its rule regarding employees obtaining authorization before posting items on the bulletin board; and that employee items were posted without authorization, and Paulin even posted a fake ad on the bulletin board for a month after she was disciplined. Respondent on brief argues that Counsel for General Counsel did not offer into evidence the leaflet that was removed, or any description of it; and that an employer which removes from its bulletin board union literature, but allows employees to post only personal items for sale, does not discriminate, *Fleming Cos.*, 336 NLRB 192, 194 (2001) and *Venture Indus.*, 330 NLRB 1133, 1134 n. 7 (2000).

In *Fleming Cos.*, supra, it is indicated, as here pertinent,

Board law on this point is clear. In *Honeywell, Inc.*, 262 NLRB 1402 (1982) , enf'd. 722 F. 2d 405 (8th Cir. 1983), the Board declared:

In general, 'there is no statutory right of employees or a union to use an employer's bulletin board.' However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or in general, any nonwork-related matters, it may not 'validly discriminate against notices of union meetings which employees also posted.' Moreover, in cases such as these, employer's motivation, no matter how well meant, is irrelevant.

⁹ *Mike Yurosek & Son, Inc.*, supra, can be distinguished in that there the Board discussed the possibility of employees planning to engage in a recurring or intermittent strike regarding overtime, which amounts to employees unilaterally determining conditions of work. There the Board concluded that the economic strikers were entitled to reinstatement but that the employer could determine what their intentions were for the future and warn them that it would regard future refusals to work overtime as grounds for disciplinary action. There the Board did not conclude that an employer has the right to condition the reinstatement of unlawfully discharged nonstriking employees on the waiver of their statutory right to engage in concerted protected activity.

(Footnotes and citations omitted.) Accord: *Roadway Express, Inc. v. NLRB*, 831 F. 2d 1285, 1290 (6th Cir. 1987) (where employer, by policy or practice, ‘permits employee access to bulletin boards for any purpose, section 7 of the Act ... secures the employees’ right to post union materials’).

5

While Respondent has a rule in its handbook regarding employee use of bulletin boards, two of Respondent’s employees testified, without contradiction, that they posted various items on the bulletin board without receiving prior approval and without having the posting initialed by the Administrator. Consequently, Respondent’s policy at the involved facility was to allow employees to post nonwork-related materials without receiving prior approval and without having the posting initialed by the Administrator. Therefore, Respondent may not validly discriminate against union notices which an employee also posted. With respect to Respondent’s argument that Counsel for General Counsel did not offer into evidence the leaflet that was removed, or any description of it, it is noted that Boehman testified that Davis told her to remove the union literature from the bulletin board and Davis did not instruct her to remove anything else from the bulletin board. Another of Respondent’s witnesses, Brown, testified that she was in the break room when Boehman took down some union postings and Paulin said something to Boehman about it. So not only did Paulin testify about the union material she posted being removed by Boehman but two of Respondent’s witnesses testified about the union material. That should be sufficient to establish that it was indeed union material that was removed from the bulletin board on March 18. Respondent violated the Act as alleged in paragraph 5(e) of the complaint.

Paragraph 6(a) and (b) of the complaint allege that about March 13, Respondent verbally warned Paulin because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for General Counsel on brief contends that Respondent violated the Act when it disciplined Paulin for confronting Boehman over the removal of the Union literature; that an employer may not provoke an employee into an outburst through its unlawful actions and then use the outburst as a basis for discipline, *Caterpillar, Inc.*, 322 NLRB 674 (1996); and that here the entire incident was provoked by Boehman’s unlawful removal of the Union material, Paulin’s behavior did not rise to the level of a threat, no threatening language was used, Paulin simply informed Boehman that she could not remove the leaflets from the bulletin board and she was going to record what Boehman did in the notebook the Union gave her for just such a purpose, and, therefore, the issuance of a verbal warning to Paulin clearly violated the Act. Respondent on brief argues that Boehman verbally counseled Paulin for being disrespectful toward her in the break room with other employees present; that Boehman did not issue Paulin a formal disciplinary action, and the verbal counseling was not part of Respondent’s progressive discipline system; that there was no tangible, adverse employment action; that Boehman testified that Paulin’s support for the Union and her posting of Union literature did not motivate Boehman’s decision to counsel Paulin; that Respondent has issued formal discipline to other employees for disrespect; and that if anything, Paulin was treated more favorably than the other employees.

According to Boehman’s testimony, Paulin asked her if she knew what she was doing was against the law, Paulin offered to show her in a book that it was against the law, and Paulin told her that she was going to record the incident in a little notebook she had. What Boehman and Brown left out in their testimony about this incident is very telling. Paulin testified that she told Boehman that she was given a little notebook from the Union to write things down that happened and she was going to write this down in her notebook. During her testimony at the trial herein, Brown did not mention Paulin’s statement to Boehman that she was given a little notebook from the Union to write things down that happened and she was going to write this down in her notebook. And although Boehman testified that Paulin told her , ‘I hope you know

that everything you're saying to me right now I'm writing down in my little white book' " (transcript page 210), Boehman did not testify that Paulin told her that she was given a little note book from the Union to write things down that happened and she was going to write this incident down in her notebook. The reason that both of Respondent's witnesses avoided testifying about the fact that Paulin told Boehman that she was going to record the incident in a note book given to her by the Union to record such events was that this was the real reason for the discipline and someone realized that in recording Boehman's unlawful activity in the Union notebook Paulin was engaged in union activity. Standing instead of sitting, placing one's hands on one's hips and then folding them, and raising one's tone of voice but not yelling cannot justify discipline in the circumstances extant here.¹⁰ Paulin's conduct was triggered by Boehman's unlawful activity. Paulin was provoked but her reaction was not sufficient to warrant discipline. Under the circumstances extant here, Paulin's reaction was restrained and measured. What Boehman did not like was being told with other employees present that what she was doing was against the law, and it was going to be recorded in a Union note book. Paulin was not being disrespectful toward Boehman in making these statements. Paulin was just stating the facts. What Boehman was doing was unlawful. And Paulin had every right to record it in note book provided to her by the Union. Boehman admitted that, without conceding that it was a union notebook. Even before this, Paulin engaged in union activity and the Respondent knew it in that Paulin, who wore a Union button to work every day and posted Union material on the bulletin board in the employee break room, passed out Union flyers in front of Respondent's building and Respondent's Director, Ann Snyder, told her to move to the street. Anti-union animus is demonstrated by the fact that Respondent unlawfully removed Union material from the bulletin board in the break room. And the discipline, albeit according to Respondent it did not become part of the progressive discipline system, was an adverse employee action. Counsel for General Counsel has made a prima facie showing under *Wright Line*, 251 NLRB 1083 (1980) enf'd. 662 F. 2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).¹¹ On the other hand, Respondent has not shown that it would have taken the same action absent Paulin assisting the Union and engaging in union activity. Respondent violated the Act as alleged in paragraphs 6(a) and (b) of the complaint.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) About January 14, 2004, Respondent discharged its employees Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder because they engaged in concerted activities with each other for the purposes of mutual aid and protection by gathering together at Respondent's facility during their break to protest staffing conditions and complain to the news media about their terms and conditions of employment,

¹⁰ It is noted that Boehman also testified that Paulin kind of snickered when she said it was against the law. Brown did not corroborate Boehman on this point. At best, Boehman's observation is a subjective evaluation. What occurred might have been nothing more than a nervous smile or laugh on the part of Paulin. This certainly would not justify discipline.

¹¹ Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

and to discourage employees from engaging in these or other concerted activities.

(b) Since about January 15, 2004, Respondent has refused to reinstate Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder unless they agree not to engage in the activity described in (a) above or other protected concerted activity.

(c) About March 13, 2004, Respondent, by Della Boehman, removed Union literature from a bulletin board at Respondent's facility despite allowing employees to post other types of nonwork-related literature on the same bulletin board.

4. By on or about March 13, 2004, verbally warning its employee Misty Paulin because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹²

¹² Respondent argues that Lemon and Adkisson are not employees but rather supervisors. As noted above, this issue was already decided against Respondent by the Regional Director of Region 25 of the Board, and the Employer's Request for Review of the Regional Director's Decision and Direction of Election was denied by Order of the Board dated May 26, with Chairman Battista dissenting, and with the majority indicating that the Employer's request raises no substantial issues warranting review. Joint Exhibit 2. As pointed out by Counsel for General Counsel on brief, a representation case finding that an individual is not a supervisor is not binding in a subsequent unfair labor practice proceeding involving a violation of Section 8(a)(1), *JAMCO*, 294 NLRB 896, 899 (1989). Counsel for General Counsel contends that nonetheless, the prior decision should be given some deference since the Board has already reviewed this issue based on the same evidence that is currently before me, and the Board has upheld the holding that LPNs at Respondent's involved facility are not supervisors within the meaning of the Act. The burden of proof is on the party claiming supervisory status. The evidence offered in the representation proceeding is the only evidence offered in the proceeding before me. Respondent argues that LPNs are supervisors because they have authority to assign, reassign, responsibly direct, discipline, transfer, and reward. Respondent does not argue that LPNs have the authority to hire, transfer, suspend, lay off, recall, promote, or effectively recommend such actions. Respondent has not introduced in this proceeding any evidence other than that which was already introduced in the representation proceeding. In effect, Respondent is asking for a different result based on the exact same evidence which has already been ruled on by the Regional Director and the Board. Respondent has not supplied any valid reasons for making findings contrary to those already made regarding Respondent's failure to show that LPNs at the involved facility are supervisors. Obviously, if Respondent had additional evidence to show

Continued

The Respondent will be required to expunge from its records any reference to the unlawful discharges of Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder, and any reference to the unlawful verbal warning to Misty Paulin.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because they engaged in concerted activities with each other for the purposes of mutual aid and protection by gathering together at Respondent's facility during their break to protest staffing conditions and complain to the news media about their terms and conditions of employment, and to discourage employees from engaging in these or other concerted activities.

(b) Refusing to reinstate employees unless they agree not to engage in the activity described in (a) above or other protected concerted activity.

(c) Removing Union literature from a bulletin board at Respondent's facility despite allowing employees to post other types of nonwork-related literature on the same bulletin board.

(d) Verbally warning an employee because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Within 14 days from the date of the Board's Order, offer Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Make Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the

that LPNs were supervisors, it would have introduced it at the trial herein. Respondent has not met its burden of proof.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Decision.

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful verbal warning given to Misty Paulin, and within 3 days thereafter notify the employee in writing that this has been done and that the unlawful verbal warning will not be used against her in any way.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility in Owensboro, Kentucky copies of the attached Notice marked "Appendix."¹⁴ Copies of the Notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since January 14, 2004.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

John H. West
Administrative Law Judge

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated Federal labor law and has
ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15 Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

20 WE WILL NOT discharge you because you engage in concerted activities with each other for
the purposes of mutual aid and protection by gathering together at our Owensboro, Kentucky
facility during your break to protest staffing conditions and complain to the news media about
your terms and conditions of employment.

25 WE WILL NOT refuse to reinstate you unless you agree not to engage in concerted protected
activities with each other for the purposes of mutual aid and protection.

WE WILL NOT remove Union literature from a bulletin board at our Owensboro, Kentucky
facility when we allow you, without prior approval, to post other types of nonwork-related
literature on the same bulletin board.

30 WE WILL NOT verbally warn you because you assist UNITED STEELWORKERS OF
AMERICA, AFL-CIO-CLC or any other union and engaged in concerted activities.

35 WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the
exercise of the rights guaranteed you by Section 7 of the Act.

40 WE WILL, within 14 days from the date of this Order, offer Sheila Kelley, Stacy Kjelsen, Misty
Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder full reinstatement
to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without
prejudice to their seniority or any other rights or privileges previously enjoyed.

45 WE WILL make Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson,
Tammy Hamilton, and Tammy Snyder whole for any loss of earnings and other benefits
resulting from their discharge, less any net interim earnings, plus interest.

50 WE WILL, within 14 days from the date of this Order, remove from our files any reference to the
unlawful discharges of Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson,
Tammy Hamilton, and Tammy Snyder and WE WILL, within 3 days thereafter, notify each of
them in writing that this has been done and that the discharges will not be used against them in
any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the

Extendicare Homes, Inc. d/b/a Bon Harbor Nursing
and Rehabilitation Center

(Employer)

10 Dated _____ By _____
(Representative) (Title)

15 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Federal Building, Room 238, Indianapolis, IN 46204-1577
(317) 226-7382, Hours: 8:30 a.m. to 5 p.m.

20 THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST
NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS
NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (317) 226-7413.